# IN THE
# SUPREME COURT OF THE UNITED STATES

October Term 1976

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No. ~~77~~ 77-192

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**UNITED STATES OF AMERICA**

Respondent

v.

**PAULINE A. STEBBINS**

Petitioner

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: 21 July 1977

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PETITION FOR WRIT OF CERTIORARI
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Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to reverse its affirmance on 24 June 1977 (Case No. 77-1078) of a judgment of the United States District Court for the District of Vermont entered 14 January 1977 (Case No. 76-63-1) finding the Petitioner

guilty of a violation of Title 18, United States Code, §1623, False Declarations Before a Grand Jury. Petitioner submits this Petition to show that the Supreme Court of the United States has jurisdiction to grant a writ of certiorari, and that such a grant is required to resolve conflicts among the Courts of Appeal.

## OPINIONS BELOW

No written opinions were issued by either the Court of Appeals or the District Court.

## JURISDICTION

The jurisdiction of the Supreme Court to review the decision by writ of certiorari is conferred by Title 28, United States Code, §1254(1). The judgment of the United States Court of Appeals for the Second Circuit was entered on 24 June 1977.

## QUESTION PRESENTED FOR REVIEW

The question presented is whether the destruction by Federal agents of their rough or field interview notes of a defendant's pre-trial statements usurps the judicial responsibility of a trial court to rule on the discoverability of evidence under (i) Rule 16 of the Federal Rules of Criminal Procedure; (ii) Title 18, United States Code §3500, the so-called Jencks Act; and (iii) the Due Process Clause of the Fourteenth Amendment to the United States Constitution (the so-called "Brady Rule" as set forth in Brady v. Maryland, 373 U.S. 83).



## CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The pertinent portions of the 14th Amendment to the Constitution of the United States; Title 18, United States Code, §3500; and Rule 16, Federal Rules of Criminal Procedure are set forth in Appendix B hereto.

## STATEMENT OF CASE

### 1. INTRODUCTION.

The Petitioner, Pauline A. Stebbins, was charged, by superseding indictment dated 9 November 1976, with violation of 18 USC §1623, False Declarations Before Grand Jury. This was the basis for federal jurisdiction in the Court of the first instance. The indictment alleged that the Petitioner made false declarations before a Federal Grand Jury in Burlington, Vermont, on 4 October 1975.

More specifically, the Petitioner was accused of making false declarations pertaining to the payment or delivery of a legal fee of $10,000.00 in cash to Frank F. Fucci, Esquire, on behalf of her son, William Paul Stebbins, on 22 May 1973. During the course of her Grand Jury testimony, the Petitioner maintained that she did not pay, transfer or transmit the $10,000.00 in question to Frank F. Fucci. The Petitioner maintained this position during the course of her trial in the District Court for the District of Vermont. The Government claimed that the Petitioner had paid or delivered the $10,000.00 in question to Frank F. Fucci.

The Petitioner was originally indicted on 8 September 1976, and entered a not guilty plea upon arraignment on 17 September 1976. A Motion for Discovery under Rule 16 was heard on 29 September 1976 and the Motion was granted. The Petitioner was arraigned on the superseding indictment on 19 November 1976, continuing her not guilty plea.

Counsel for the Petitioner filed a Motion to Produce Rough Notes Under Federal Rules of Criminal Procedure, Rule 16, and under 18 USC §3500. The Government opposed this Motion. A hearing was held on 29 and 30 November 1976, during which the four government agents involved were all examined in open court, in the absence of the jury. The District Court denied the Petitioner's Motion, on 30 November 1976.

After a five-day jury trial, the Petitioner was found guilty of making false declarations to the Grand Jury concerning the payment or delivery of a legal fee on behalf of her son, William Paul Stebbins. An appeal was then taken to the United States Court of Appeals for the Second Circuit and that court upheld the Petitioner's conviction (See Appendix A).

2. STATEMENT OF FACTS.

The Petitioner was convicted because the jury believed she handed or otherwise transferred to Frank F. Fucci the sum of $10,000 in cash on behalf of her son, William Paul Stebbins, on 22 May 1973 at the Polka Dot Restaurant at White River Junction, Vermont.



The key government witnesses were Frank F. Fucci, two Federal Bureau of Investigation agents and two Internal Revenue Service agents. The government agents testified at trial as to matters which were discussed during the course of their interviews with the Petitioner.

Counsel for Petitioner argued that if the agents were not able to produce their rough notes they should not be allowed to testify at the trial of the Petitioner. While the Petitioner's Motion to Produce Rough Notes did not specifically include the question of the rough notes taken by I.R.S. agents, Edward R. Burke and Ronald R. DeCoigne, the written motion was orally amended on 26 November 1976 to include both agents. At this 26 November 1976 hearing the Court was requested to exclude the testimony not only of F.B.I. agents Albert O. Axton and John E. Hess, but also the testimony of I.R.S. agents Burke and DeCoigne unless all of those agents were able to produce for inspection their rough interview notes.

After the voir dire of the four agents, Counsel for Petitioner argued that those agents should be precluded from testifying unless they were able to produce their rough or field notes of their interviews with the Petitioner. The basic theory of Petitioner was that such rough or field notes were required to be presented to the Court for the Court's physical inspection so that the Court (rather than the government) could make a determination as to whether such evidence was discoverable evidence, insofar as the Petitioner was concerned. Counsel referred the Court to three

separate sources in support of the foregoing argument, namely: (1) The Jencks Act Title 18, United States Code §3500; (2) Rule 16 of the Federal Rules of Criminal Procedure; and (3) Brady v. Maryland, 373 U.S. 83, 83 SCt 1194, 10 LEd 2d 215 (1963). The Trial Court denied the Motion and refused to impose the sanctions requested by Counsel for Petitioner. These arguments were raised anew in the Court of Appeals. See Appendix C.

The Petitioner presents a brief review for the Supreme Court of the testimoney of Frank Fucci, F.B.I. Agents Axton and Hess, and I.R.S. agents Burke and DeCoigne, as a background against which the Supreme Court may judge the crucial nature of the testimony of the government agents and the prejudice suffered by the Petitioner.

The testimony of Frank F. Fucci demonstrates not only that he was the government's key witness, but also that he was not a strong witness due to the extent of the confusion and contradictions which characterized his testimony.

The testimony of the four agents shall be briefly reviewed, first, with respect to the manner in which the interviews were conducted, and the creation and destruction of rough interview notes; and, secondly, with respect to the bearing the testimony of these four agents had on the conviction of the Petitioner, in corroboration of Fucci's testimony.

It is the contention of the Petition-



er that the impact of the testimony of the four government agents was crucial in light of the confusion and contradictory evidence given by Frank F. Fucci, the key Government witness.

A - The Testimony of Frank F. Fucci.

Prior to the commencement of the trial in the District Court, the Government admitted that without the testimony of Frank F. Fucci, it would be virtually impossible to convict the Petitioner. (See Appendix D) Accordingly, by the Government's own, pretrial admission, Frank F. Fucci was its crucial witness.

Fucci testified at the Petitioner's trial that he received the $10,000.00 fee sometime before 9:30 A.M. on 22 May 1973 at the Polka Dot Restaurant; that on the morning in question he was seated in a booth at the Polka Dot Restaurant with both Pauline A. Stebbins and her son, William Paul Stebbins; that he asked William Paul Stebbins if he had raised his legal fees; that Pauline A. Stebbins left the booth and went to the area of the cash register and obtained a paper bag containing the $10,000.00 which she brought back to the booth and handed to Fucci; and that he immediately took the $10,000 to his office.

He further testified that at approximately 1:30 P.M. on the same day, 22 May 1973, Frank F. Fucci took one-half of the cash he had earlier received to the office of his co-counsel, Frank G. Mahady.

At the Vermont District Court session

of 22 May 1973 William Paul Stebbins entered a plea of no contest to a charge of simple assault; the charge had been reduced from aggravated assault as the result of a plea bargain worked out between Frank F. Fucci and the office of the Windsor County State's Attorney. Attorney Fucci's recollection was that the criminal information was amended during the District Court Session by Deputy State's Attorney, Michael Sheehan.

Testimony by Agent Axton, not subject to Petitioner's Motion for exclusion, established that on the Friday immediately preceding his 30 November 1976 Trial Court testimony, Fucci told the Assistant U.S. Attorney and F.B.I. Agent Axton that on the morning of 22 May 1973 he (Frank F. Fucci) requested his fee from Pauline A. Stebbins (as opposed to William Paul Stebbins) and that William Paul Stebbins was not even present at the Polka Dot Restaurant on the morning of 22 May 1973.

In addition, I.R.S. Agent Burke testified that when he interviewed Frank F. Fucci on 14 May 1974 at Frank F. Fucci's offices in White River Junction, Vermont Fucci stated, among other things, that when Fucci received the $10,000.00 fee at the Polka Dot Restaurant on 22 May 1973 from Pauline A. Stebbins there were no witnesses to the transaction. Finally, I.R.S. Agent James F. Tighe also testified that on 14 May 1974 Frank F. Fucci stated that there were no witnesses to the transaction.



Agent Axton also testified that on the Friday immediately preceding Frank F. Fucci's testimony, Fucci had stated to the Assistant U.S. Attorney and Agent Axton that he (Frank F. Fucci) had requested from the Petitioner one or two days before 22 May 1973, that she have his fee available on the morning of 22 May 1973. At the trial, though, just four days later, Fucci did not recall making such a statement on the preceding Friday and, furthermore, he did not recall making any arrangements with respect to his fee prior to 22 May 1973.

Fucci was unable to recall whether State's Attorney Paul Hudson or Deputy State's Attorney Michael Sheehan amended the criminal information against William Paul Stebbins on 22 May 1973, although he did recall that Michael Sheehan was present in Court on that date; that the information was amended at the bench on that date; and that Paul Hudson was not present in Court on that date. Even though the amended information bore the initials of Paul F. Hudson, witness Fucci could not explain this discrepancy.

Yet another significant discrepancy which surfaced at the trial concerned the payment by Fucci of $5,000.00 to Frank G. Mahady, his co-counsel. On direct examination Fucci testified that he took $5,000.00 to Mahady after lunch, at approximately 1:30 P.M. on 22 May 1973; however, on cross examination it was brought out that in November of 1974 Fucci told Agents Burke and Tighe that after he (Frank F. Fucci) received the $10,000.00 in the Polka Dot Restaurant,

he walked immediately across the street to Mahady's office and paid him $5,000.00. Agent Burke testified on cross examination that in May of 1974 Frank F. Fucci told him that after receiving the $10,000.00 fee "he [Fucci] departed the Polka Dot Restaurant and that he walked across the street to the Coolidge Hotel to the office, to the second floor, to the office of Frank Mahady" in order to give Mahady $5,000.00 in cash from the brown paper bag.

Thus, the Government's key witness gave Trial Court testimony which directly contradicted previous statements which he had given to various government agents concerning three very significant events which occurred on 22 May 1973 and concerning one significant event which occurred prior to 22 May 1973, namely:

1. The presence of William Paul Stebbins at the time the money was allegedly handed to Fucci by the Petitioner.

2. The time of payment to Attorney Mahady of his portion of the fee.

3. Whether prior arrangements, in advance of the 22 May 1973 hearing, had been made for payment of the fee.

4. Whether the State's Attorney or Deputy State's Attorney amended the original criminal complaint, in open court, in Fucci's presence.

Fucci testified that his files and records contained no notes, memoranda or any written record as to who actually



paid or handed him the $10,000.00 on 22 May 1973, until he corresponded with the Internal Revenue Service on 19 March 1974, at which time he stated in writing, for the first time, that the $10,000.00 was paid by Pauline A. Stebbins.

It is the Petitioner's contention that such facts can lead only to one conclusion, namely, that Fucci either contradicted himself concerning, or was confused about, numerous significant events which occurred on or immediately prior to 22 May 1973. It is not unreasonable to assume that absent the supporting testimony given by the various government agents in this case, the jury would have made a determination that Fucci was also confused about the identity of the person who handed him the $10,000.00 on 22 May 1973. Because of the contradictions, discrepancies and confusion which characterized Frank F. Fucci's testimony, the testimony of the Government agents took on an importance which such testimony would not otherwise have had.

B - <u>Statements to Agents Axton and Hess</u>.

F.B.I. Agents Axton and Hess interviewed the Petitioner at the Polka Dot Restaurant on 7 January 1976. The final version of the interview form (F.B.I. Form 302) was prepared by Axton. Agent Hess did not take any field notes and the interview was conducted by Agent Axton. There were no other witnesses to the interview.

Agent Axton did not take any notes

during the 15 minute interview on 7 January 1976 with the Petitioner. He reduced his recollection of the "substance" of the interview to a typed rough draft of Form 302. His rough draft of Form 302 consisted of a typewritten draft prepared by himself, which he forwarded to Albany, New York to be retyped by a stenographer. When the final draft of Form 302 was returned to him from Albany, he compared it to his rough draft Form 302 and then destroyed his rough draft Form 302.

Agent Axton typed the rough draft 302 on 8 January 1976, the day after the interview took place. He stated that he had performed other duties (which could have consisted of both office work and other interviews) on the day of the interview with the Petitioner. The rough draft Form 302 was reviewed by Agent Hess before it was mailed to Albany.

Agent Axton testified that he believed that it was standard operating procedure for F.B.I. agents to destroy rough drafts of interview notes.

In testifying concerning whether the final draft of Form 302 contained any verbatim statements, Agent Axton prevaricated. At one point he indicated that he had no "knowledge" or "recollection" if the final draft of Form 302 contained any of the exact words used by the Petitioner, but that it was his practice to put exact words in quotes. However, when asked whether one of the sentences from the final draft of Form 302 contained the exact words used by the Petitioner, Agent Axton stated that



"It could be a change of an adjective, or a preposition or something like that. This is in substance, what she said."

The third and fourth sentences of the final draft of Form 302 state as follows:

1. Sentence No. 3

"She stated that the fee of $10,000.00 which was paid to Fucci was provided by Joseph Leary and was in cash and that she had given the money to Fucci."

2. Sentence No. 4

"She stated that she denied that she had paid the money and that this was the truth."

C - Statements to Agents Burke and DeCoigne.

I.R.S. Agents Burke and DeCoigne conducted a ten to fifteen minute interview of the Petitioner at the Polka Dot Restaurant on 18 September 1973. The final version of the Memorandum of Contact was prepared primarily by Agent Burke, who took written notes during the course of the interview; Agent DeCoigne did not take any written notes during the course of the interview. The final version of the Memorandum of Contact, which pertains to the interview of the Petitioner, consisted of less than two type written pages. According to Agent Burke's testimony, after the completion of the interview of the Petitioner, the agents interviewed William Paul Stebbins for approximately thirty to thirty-five minutes.

After these interviews were completed, Agent Burke testified that he:

1) returned to his office; 2) reviewed his rough notes; 3) prepared an outline of his rough notes, with the assistance of Agent DeCoigne; and 4) dictated, into a cassette tape recorder the final Memorandum which was based upon his outline of his rough notes.

Subsequently, the dictation tape was given to a group secretary who transcribed it, and returned the transcription to Agent Burke. He then compared the transcription with his original notes and outline; made any "appropriate changes necessary"; and then destroyed his original notes.

According to Agent Burke, the outline could have been prepared on the day of the interview or as many as two days after the interview. The dictation of the final Memorandum, from the outline, was done anywhere from three to five days after the interview. Agent Burke conducted between thirty-five and forty interviews in connection with the I.R.S. investigation of William Paul Stebbins, including the interview in question.

Agent Burke testified that during the course of the interview in question he 'may have taken verbatim statements', but that his usual practice was to put such statements in quotes. He further testified that he did not "recall taking specific verbatim statements."

However, before Agent Burke was initially confronted with the use of the word "verbatim", he stated that he "would record statements made by Mrs. Pauline Stebbins or William Paul Stebbins that may relate to the income tax



liability of William Paul Stebbins at some future date" (emphasis added).

Also, Agent DeCoigne indicated that it was possible that Agent Burke took some verbatim remarks during the interview. It must be noted that Agent DeCoigne indicated that with respect to the preparation of a summary "We summarized the points which we covered in the interview. The questions which were asked and the responses thereto and then we dictated them into a machine." (emphasis added.)

The first typewritten page of the final Memorandum of Contact contained thirty-nine statements of fact alleged to have been made by the Petitioner during the ten to fifteen minute interview. Agent Burke conceded that "actually all of those statements were made by her, generally." Thus, during the course of a ten or fifteen minute interview, Agent Burke took field or rough notes which enabled him to eventually prepare a final Memorandum of Contact which, on one single page, contained thirty-nine statements of fact allegedly made by the Appellant.

Agent Burke persisted in his claim that the Memorandum of Contact merely "paraphrased" what was said by the Petitioner Stebbins on 18 September 1973. However, when counsel for Petitioner focused on one allegedly paraphrased statement from the Memorandum of Contact, the following trial court exchange took place:

Q. Let me read to you an alleged

statement of fact which you have numbered as 17. This is in reference to her son William. It says, "has many friends in White River Junction." Now, if that is a paraphrase of a statement made by Mrs. Stebbins, what would the original statement have sounded like, do you recall?

A. She may have said he made, he had many associates or friends. I couldn't really venture that is exactly what she said. If I recorded exactly what she said, it would usually be in quotes. That is my standard procedure.

It is obvious that the Memorandum of Contact which resulted from the 18 September 1973 contained numerous verbatim or substantially verbatim statements allegedly made by the Petitioner.

Agent Burke testified that it was his routine practice to destroy his rough notes even though he did not "recall specifically if there are any citations in the manual telling him to save notes."

In summary, Frank F. Fucci, was the only Government witness who testified that he saw the Petitioner hand him the $10,000.00; the two F.B.I. Agents were the only Government witnesses who testified that the Petitioner told them that she had given the money to Fucci. No other government witness or evidence established the transactions in question or established that the Petitioner made



any statement to the effect that she had given the money to Fucci.

3. ARGUMENT

The Petitioner requested from the government all materials and statements, in any form, which the government might have, to which the Petitioner was entitled under Rule 16 of the Federal Rules of Criminal Procedure. When it became apparent that the government could not provide the rough or field interview notes, the Petioner sought suppression of the testimony of the government agents involved. The District Court denied this relief. The Petitioner properly preserved her claims in regard to this evidence, which claims were properly argued on appeal to the Court of Appeals. A more detailed account of these arguments is set forth in the excerpts from the Petitioner's Court of Appeals Brief in Appendix C.

The Petitioner, in the District Court and in the Court of Appeals, relied directly upon U.S. v. Harrison, 425 F2d 421 (CA DC, 1975) and U.S. v. Harris, 543 F2d 1247 (CA 9, 1976), in which the Courts of Appeal ruled that preservation of the notes in issue was mandatory in order to permit the trial court to rule upon admissibility and discoverability of evidence. The Court of Appeals for the Second Circuit has rejected this argument, and in affirming the Petitioner's conviction, thereby creating a conflict between the Circuits, which requires the granting of the Writ of Certiorari sought by the Petitioner.

## REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

1. By affirming the judgment of the District Court, the United States Court of Appeals for the Second Circuit, in view of the only issue raised, briefed and argued (as set forth in Appendix C) by Petitioner, has held that Rule 16 of the Federal Rules of Criminal Procedure; the Jencks Act, Title 18, United States Code §3500; and the Due Process Clause of the 14th Amendment do not require preservation of rough or field interview notes of government agents to insure that the trial court has such notes available for making a determination of discoverability.

2. The United States Court of Appeals for the District of Columbia Circuit, in United States v Harrison, 524 F2d 421 (1975) and in the United States Court of Appeals for the Ninth Circuit, in United States v Harris, 543 F2d 1247 (1976), have held that the Jencks Act, Rule 16, and the Due Process Clause do require preservation of such notes to insure that the trial court has such notes available for making a determination of discoverability.

3. There exists a conflict between positions of the different Courts of Appeal as to the issue of preservation of such notes. Such conflict is a special and important reason for granting review on writ of certiorari. Rule



19(1)(b) of the Rules of the Supreme Court of the United States.

WHEREFORE, the Petitioner prays that a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted to review its decision, as it affects Petitioner.

Respectfully submitted,

PAULINE A. STEBBINS

By STEBBINS & BRADLEY, P.A.
Her Attorneys

By: Daniel J. Connolly
Daniel J. Connolly

John J. Long, Jr.
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Dated: 21 July 1977

## APPENDIX A

The following are the orders entered in the United States District Court for the District of Vermont on 14 January 1977 and in the United States Court of Appeals for the Second Circuit on 24 June 1977:

UNITED STATES DISTRICT COURT FOR
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

vs. Criminal
Docket No. 76-63-1

PAULINE A. STEBBINS

JUDGMENT AND PROBATION/COMMITMENT ORDER.

. . .

There being a finding/verdict of Guilty.

Defendant has been convicted as charged of the offense of Title 18, United States Code § 1623. . . .

Signed by /s/ James S. Holden
U. S. District Judge

Date: Jan. 19, 1977

* * *



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

. . .

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by
Arthur Heller
Deputy Clerk

## APPENDIX B

The following constitutional, statutory and rule provisions are referred to in the Petition:

### U. S. CONSTITUTION
### AMENDMENT XIV.

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

### TITLE 18, UNITED STATES CODE

§ 3500. Demands for production of statements and reports of witnesses

. . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the



testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . .

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transciption thereof, if any, made by said witness to a grand jury.

* * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16.

DISCOVERY AND INSPECTION

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been



able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

## APPENDIX C

The following are excerpts from Petitioner's Brief filed in the United States Court of Appeals for the Second Circuit, establishing that the issues raised in this Petition were raised in the Court below:

III - ISSUE

The destruction of rough or field notes of a defendant's statements, by government agents, usurps the judicial responsibility to rule on the discoverability of evidence under the Brady Rule, the Jencks Act and Rule 16 of the Federal Rules of Criminal Procedure. Destruction of such notes requires suppression of testimony by the agents as to the evidence contained in such rough or field notes.

IV - ARGUMENT

A - Determination of Discoverability of Evidence is the Duty for the Court.

The determination as to discoverability of evidence is one for the Court to make, not the prosecution or government agents. Campbell v. U.S., 365 US 85 at 92-93, 81 SCt 421, 5 LEd2d 428 (1961). The question of production of statements is not to be solved through one party's determination that they are not to be produced for defense counsel or the trial judge, for determination as to their relation to the matters in issue.



Palermo v U.S., 360 US 343 at 361, 79 SCt 1217 at 1229, 3 LEd2d 1287 (1959) (Brennan, J., concurring).

If government agents may indiscriminately destroy rough or field notes, such as those generated and then destroyed by Agents Axton and Burke, the agents are, in effect, determining that such rough or field notes are not to be viewed by not only counsel for the defendant, but the trial court itself. The destruction of the rough or field notes prepared by Agents Axton and Burke usurped the judicial function of determining the discoverability of such notes pursuant to applicable constitutional and statutory standards. U.S. v Harrison, 524 F2d 421 (CA DC, 1975) and U.S. v Harris, 543 F2d 1247 (CA 9, 1976). As such, the Trial Court should have prohibited the government agents involved from testifying as to matters for which rough or field notes had been prepared and destroyed, as the only appropriate sanction which would preserve to the trial court its prerogative to rule upon evidentiary questions of discoverability. [pp. 19-20]

B - The "Brady Rule," the Jencks Act, and Rule 16 of the Federal Rules of Criminal Procedure Provide Independent Foundations for Preservation of Discoverable Materials.

. . .

The so-called "Brady Rule," enumerated in Brady v. Maryland 373 US 83 at 87, 83 SCt 1194 at 1196, 10 LEd2d 215, (1963) holds that suppression of evi-

dence favorable to the accused, upon a request for production, violates due process of law, where the evidence is material either to guilt or to punishment; and irrespective of the good or bad faith of the prosecution.

The destruction of rough or field notes by Agents Axton and Burke precluded any possible defense or judicial examination of the evidence for material discrepancies or other exculpatory information which might have brought the Brady Rule into play. The principle that rough or field notes from any witness interview could prove to be "Brady" material has been accepted by the Court of Appeal for the District of Columbia in U.S. v. Harrison, supra, 524 F2d at 427, and by the Court of Appeals for the Ninth Circuit in U.S. v. Harris, supra, 543 F2d at 1252.

Two additional and independent bases requiring the preservation of evidence are the Jencks Act, 18 USCA §3500, and Rule 16 of the Federal Rules of Criminal Procedure. The Jencks Act prohibits pretrial discovery of statements made by prospective government witnesses. If the witness testifies on direct examination at trial, however, the Act requires the government to produce previous statements of the witness insofar as they relate to the testimony at trial. U.S. v Percevault (2d Cir 1974) 490 F2d 126, U.S. v Sebastian (2d Cir 1974) 497 F2d 1267. The Jencks Act defines statements as writings signed or adopted by the witness or accounts which are "a substantially verbatim recital of an oral statement made by such witness and recorded contemporaneously with the



making of such oral statement". 18 USCA §3500(c).

U.S. v Johnson, 521 F2d 1318 (9th Cir, 1975) noted that it is well established that individual notes and reports of government agents who testify for the government are the proper subject of inquiry and may be subject to production under the Jencks Act. The Court noted that it is the function of the trial court to determine producibility, i.e., to decide whether the notes constitute a Jencks Act "statement" and that the agents' testimony

> ..." to the effect that all of the information contained in the notes was transferred to his case report did not relieve the trial court of the duty to conduct the requested inquiry....The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant. Certainly the answer should not rest with the very witness whose testimony the defendant seeks to impeach." [U.S. v. Johnson, supra, 521 F2d at 1320]

Admittedly, there are several cases in this Circuit indicating that, in varying contexts, the Jencks Act imposes no duty on law enforcement officers to retain rough notes when the contents are incorporated into official records and the notes are destroyed in good faith. U.S. v. Terrell 474 F2d 872 at 877 (2nd Cir 1973); U.S. v. Covello 410 F2d 536 at 545 (2nd Cir 1968); U.S. v. Jones 360 F2d 92 at 95 (2nd Cir. 1966). This

practice, however, was criticized in U.S. v Thomas 282 F2d 191 at 194 (2nd Cir 1960).

> [Jencks Act] 'statement' means a fairly comprehensive reproduction of the witness' words and does not include fragmentary notes, jottings, scraps or writings which are not 'substantially verbatim'. However, as a practical matter such a construction does not mean that notes of the type here made should be destroyed. Wherever the word 'substantially' is used, there will be a need for some judge to determine what is substantial. In this case he might well have held that these notes did not come within the statute. If so, production would not have been required. On the other hand, he might have found enough therein to warrant production. Borderline situations should be resolved by the trial judges and not by government agents. Hence it would be the better practice to preserve the written notes taken on interviews with persons accused or suspected of crime.

It should be noted that these cases focused on the Jencks Act and its restrictive definition of "statement", rather than the general duty of preservation of evidence. None of the cases analyzed addressed the Jencks Act requirements in conjunction with the Brady Rule or Rule 16 of the Federal Rules of Criminal Procedure, which are independent grounds for preservation of



rough or field notes. [pp. 20-23]

. . .

Rule 16 of the Federal Rules of Criminal Procedure now provides, inter alia, that upon request of a defendant the government shall permit the defendant to inspect and copy "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent." In U.S. v Johnson, supra, this Court held that the written summary of an oral statement made by a defendant to a government agent is discoverable under Rule 16(a). Furthermore, where a government agent's memorandum sets forth the substance of statements attributed to the defendant, even if it is not verbatim, it is a recorded summary of statements attributed to the defendant, and subject to inspection under Rule 16(a). U.S. v Kuperberg, 288 F. Supp. 115 at 116 (S.D.N.Y. 1967). U.S. v Crisona 416 F2d 999 (2nd Cir 1969) concluded that tape recordings, even though a transcript was given to defendant, were statements for Rule 16(a) purposes and discoverable.

The 1975 amendment of Rule 16 continued the modern trend of granting greater discovery to both the government and the defense. Disclosure under Rule 16(a)(1)(A), "Statement of Defendant", was made mandatory to counteract the occasional judicial requirement that good cause was required to be shown. More liberal discovery, according to the 1975 Committee note,

contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. [8 Moore, Federal Practice, ¶ 16.01[4]]

The Committee noted that a majority of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial rejected the restrictive Jencks Act definition of producible statement. The majority believed that the defendant should be able to see his statement in whatever form it may have been preserved. "... in fairness to the defendant and to discourage the practice, where it exists, of destroying original notes, after transforming them into secondary transcriptions, in order to avoid cross-examination based upon the original notes." (Emphasis added)

Appellant urges that the routine destruction of interview notes and original draft memoranda flies in the face of the legislative purpose of the 1975 revisions to Rule 16. [pp. 24-25]

. . .

D - The Failure of the Trial Court to Exclude the Agents' Testimony Constituted Reversible Error to the Substantial Prejudice of the Appellant.

Reviewing the testimony of Frank F.



Fucci, without whose testimony the government admitted it would be virtually impossible to convict the Appellant, it becomes apparent that the testimony of Agents Axton, Hess, Burke and DeCoigne was as crucial to the government's case as was the testimony of Fucci. Fucci's otherwise contradictory, confused and uncertain testimony was directly supported by the testimony of the Agents involved; and Agent Axton's testimony as to his 7 January 1976 interview with the Appellant is the only direct evidence from the Appellant indicating her Grand Jury testimony was not accurate. [pp. 27-28]

. . .

In the absence of the rough draft of Agent Axton's report and Agent Burke's rough or field notes, we are adrift as to how to insure the Appellant her right to obtain all of her own statements, in whatever form, in possession of the government, as guaranteed by Rule 16 of the Federal Rules of Criminal Procedure; her right to have judicially determined whether the statements were substantially verbatim, thus discoverable under the Jencks Act; or of potential aid to Appellant in cross-examining government witnesses, thus discoverable under the Brady Rule. As pointed out in U.S. v. Harrison, supra, and U.S. v. Harris, supra, if the rough draft or rough or field notes cannot be produced, thus prejudicing the defendant, then the testimony of the agents involved must be kept from the trier of fact.

In Harrison the Court did not impose the sanctions Appellant seeks here, holding that the defendant Harrison had not been prejudiced because the contemporaneous rough or field notes of local police officials had been preserved, affording the defendant an opportunity to examine the notes and use them in preparing his case. 524 F2d at 435.

In Harris the Court also did not impose the sanctions Appellant seeks here, holding that the testimony of the agent whose notes had been destroyed was favorable to the defendant, resulting in no demonstrable prejudice to the defendant. 543 F2d at 1253.

In this case, though, it is clearly demonstrable that the testimony of the government agents was crucial to corroborate the less-than-sound testimony of Fucci and to establish vital admissions allegedly made by the Appellant. It is also reasonable to assume that such testimony had a significant effect on the outcome of the trial.

In the presence of the jury Agent Axton gave testimony relative to his interview of the Appellant on 7 January 1976 at the Polka Dot Restaurant at White River Junction, Vermont. Agent Axton questioned her about her testimony before the Federal Grand Jury on 4 September 1975 (Tr. p 289). He stated that during the course of the interview she told him that $10,000.00 came from Joseph Leary and that she had given the money to Frank Fucci (Tr. p 290). Agent Axton went on to testify that the Ap-



pellant then stated to him that she had told the Grand Jury that "she had not paid money, that she had not denied that she had given the money to him." (Tr. p 290) In other words, Agent Axton testified that when he interviewed her she made a distinction between the words "pay" and "deliver", explaining to him, in effect, that while she had delivered the money to Frank Fucci she had not paid him the money (Tr. p 306 and App. p 28 for a copy of page 304 of the Transcript which contains the incriminating statements allegedly made by Pauline A. Stebbins to Agent Axton).

If the Appellant in fact made such a statement to Agent Axton, that she had delivered the money to Frank F. Fucci, it would have been inconsistent with portions of her Grand Jury testimony, establishing the government's case. See the Indictment, App. p 1.

Agent Hess also testified before the jury relative to the 7 January 1976 interview conducted by Agent Axton. His testimony confirmed the testimony of Agent Axton. (Tr. p 318). It may be recalled that Agent Hess did not take any notes during the course of the interview (Tr. p 320).

The importance of the testimony of Agents Axton and Hess to the government's case cannot be overstated.

In Harrison, Judge Wright made it clear that notes of the nature Appellant sought, but which had been destroyed, would have to be preserved:

We cannot conceive that any valid law enforcement interest will be impaired by retention of the rough notes taken in interviewing witnesses. It may well prove that the Government is correct in its judgment that the notes are almost never discoverable, that they are too cryptic or fragmentary to be producible "statements" under the Jencks Act, and that they are always integrated into the 302 reports with such accuracy and completeness that there is nothing even arguably "favorable" about them to trigger disclosure under Brady v. Maryland. But such judgments cannot be made in gross. They must be decided in each individual case, and they must ultimately be decided by a court. Our holding does nothing more than preserve the evidence so that a court can meaningfully play its proper role. [524 F2d at 435]

Judge Orrick in Harris spoke just as forcefully at 543 F2d 1253, noting:

> We reiterate our holding, however, that the F.B.I. must hereafter preserve the original notes taken by agents during interviews with prospective government witnesses or with an accused. The preservation of such evidence is necessary in order to permit courts to play their proper role in determining what evidence must be produced pursuant to the Jencks Act or other applicable law.



In similar fashion, Appellant urges this Court to adopt the rationale of Harrison and Harris for the Second Circuit; and to apply the principles not just prospectively, but to this case, due to the clearly crucial and clearly prejudicial nature of the Agents' testimony. [pp. 30-34]

. . .

## APPENDIX D

The following is an excerpt from a Motion filed by the Government in the District Court for the District of Vermont on 12 October 1976:

### OPPOSITION TO MOTION TO TAKE DEPOSITION and MEMORANDUM OF POINTS AND AUTHORITIES

The UNITED STATES OF AMERICA, by and through George W.F. Cook, United States Attorney for the District of Vermont, hereby states its opposition to the motion of defendant Pauline A. Stebbins to take the deposition of Frank R. Fucci in the above-captioned case. . . . [followed by a discussion of points and authorities as to Rule 15 relevant to a requested deposition of Fucci] . . . Defendant is well aware in this particular case that should something happen to Frank Fucci which would prevent him from testifying at the trial of Pauline A. Stebbins the Government would find it virtually impossible to convict Pauline A. Stebbins. The Government has indicated unequivocally that it intends to call Frank Fucci as a witness, and as such he is a witness for the Government under Rule 15. . . .

Dated at Burlington, in the District



of Vermont, this 12th day of October, 1976.

UNITED STATES OF AMERICA

GEORGE W. F. COOK
United States Attorney

By: /s/ Jerome F. O'Neill
JEROME F. O'NEILL
Assistant
U. S. Attorney